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**STATE OF WISCONSIN  
Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

[REDACTED]

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**PRELIMINARY RECITALS**

Pursuant to a petition filed December 03, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Racine County Department of Human Services in regard to Medical Assistance, a hearing was held on February 06, 2014, at Racine, Wisconsin.

The issue for determination is whether the Disability Determination Bureau (DDB) correctly denied Petitioner's application for Disability-based Medicaid benefits.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703  
By: DDB by file

**ADMINISTRATIVE LAW JUDGE:**

Mayumi M. Ishii  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a resident of Racine County.
2. On March 18, 2013, the Petitioner filed an application for disability-based Medicaid benefits. In his application, the Petitioner stated that he became disabled due to gangrene in his left foot. (DDB file.
3. On June 18, 2013, the Petitioner filed a second application for disability-based Medicaid benefits. The Petitioner did not complete the section under the question, "What is your disability?"

However, he did indicate that he had a difficult time walking because he is missing two toes, one on his left foot and one on his right. (DDB file)

4. On or about July 23, 2013, the Petitioner filed a third application for disability-based Medicaid benefits, stating that he is disabled because of Atherosclerosis, cellulitis and abscess, Type II or unspecified type diabetes - uncontrolled, tobacco use, cellulitis and abscess of foot, except toes, traumatic amputation, gangrene, cellulitis of foot, right, ulcer of other part of foot, right, and, "non-compliance". (DDB file)
5. On November 15, 2013, the Department of Health Services sent the Petitioner a notice indicating that he did not qualify for Medicaid-Disability benefits. (DDB file)
6. On December 3, 2013, the Petitioner filed for reconsideration of the DDB's decision. In that application, the Petitioner indicated that his condition had not changed since he filed his initial application. (DDB file)
7. On January 10, 2013, the DDB again denied Petitioner's application and on January 14, 2014, the DDB forwarded its file to the Division of Hearings and Appeals for review. (DDB file)
8. The Petitioner suffered gangrenous infections in both feet that resulted in the amputation of his left "big" toe and his right third toe. The infection has reoccurred in Petitioner's left foot and may require further amputations of Petitioner's toes to control the infection. (DDB file; Testimony of Petitioner)
9. Petitioner suffers from peripheral neuropathy. (DDB file)
10. Petitioner is 53 years old, has a ninth grade education and worked for 24 years as a mechanic at a bowling alley. (DDB file; Testimony of Petitioner)


### **DISCUSSION**

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. State v. Hanson, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980) *citing to State v. McFarren*, 62 Wis. 2d 442, at 499, 215 N.W.2d 459 at 463 (1974). In a case involving an application for medical assistance, the applicant has the initial burden to establish he or she met the application requirements. Estate of Gonwa ex rel Gonwa v. Wisconsin Dept. of Health and Family Services, 265 Wis.2d 913, 668 N.W.2d 122, 2003 WI App 152.

A person between ages 18 and 65, with no minor children, must be blind or disabled to be eligible for MA. A finding of disability must be in accordance with Federal Social Security/SSI standards. *See Wis. Stats. §49.47(4)(a)4.*

Although the determination of disability depends upon medical evidence, it is not a medical conclusion; it is a legal conclusion. The definitions of disability in the regulations governing MA require more than mere medical opinions that a person is disabled in order to be eligible. There must be medical evidence that an impairment exists, that it affects basic work activities, that it is severe, and that it will last 12 months or longer as a severe impairment. Thus, while the observations, diagnoses, and test results reported by the Petitioner's physicians are relevant evidence in determining impairment, the doctors' opinions as to whether the petitioner is disabled for the purposes of receiving MA are not relevant.

Under the regulations established to interpret Title XVI, a claimant's disability must meet the 12-month durational requirement before being found disabling. In addition, the disability must pass five sequential tests established in the Social Security Administration regulations. Those tests are as follows:

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1. An individual who is working and engaging in substantial gainful activity will not be found to be disabled regardless of medical findings. *20 CFR 404.1520 (b)*.
  2. An individual who does not have a "severe impairment" will not be found to be disabled. A condition is not severe if it does not significantly limit physical or mental ability to do basic work. *20 CFR 416.921(c)*.
  3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and meets or equals a listed impairment in Appendix I of the federal regulations, a finding of disabled will be made without consideration of vocational factors (age, education, and work experience.) *20 CFR 404.1520(d)*.
  4. If an individual is capable of performing work he or she has done in the past, a finding of not disabled must be made. *20 CFR 404.1520(f)*.
  5. If an individual's impairment is so severe as to preclude the performance of past work, other factors, including age, education, past work experience and residual function capacity must be considered to determine if other types of work the individual has not performed in the past can be performed. *20 CFR 404.1520(g)*.

These tests are sequential. If it is determined that an applicant for MA is employed or does not suffer from a severe impairment it is not necessary to proceed to analyze the next test in the above sequence.

The DDB found Petitioner to suffer from a severe impairment expected to last 12 months or more, but it also found that despite the impairment, Petitioner is still able to engage in substantial meaningful activity based upon the tests described below.

#### TEST 1

The first test asks whether an individual is working and engaging in substantial gainful activity.

“Substantial activity” is defined as, “work activity that involves doing significant physical or mental activities. Your work may be substantial, even if it is done part time basis.....” *20 CFR 404.1572(a)*

“Gainful work activity” is defined as, “work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized.” *20 CFR 404.1572(b)*

Earnings can be used to determine whether a person is engaging in substantial gainful activity. *20 CFR 404.1574(a) and (b)*. The 2014 substantial gainful activity (SGA) income limit for non-blind individuals is \$1070 per month. (*Please see* [www.ssa.gov](http://www.ssa.gov))

Petitioner is not currently working. As such, he passes test 1.

#### TEST 2

Petitioner passes test 2 because the DDB did not dispute, in its reports, Petitioner’s assertion that he suffers from severe impairment.

### TEST 3

The question presented here is whether petitioner's impairment meets the criteria listed in Appendix 1 to Subpart P of Part 404 of the Code of Federal Regulation (CFR). These are commonly referred to as the "listing criteria". If Petitioner meets the aforementioned criteria, tests 4 and 5 do not need to be done; she qualifies as disabled. If Petitioner does not meet the criteria, then he must pass tests 4 and 5 to be considered disabled.

Petitioner's chief complaint is that he is disabled by diabetes and related complications, specifically gangrene infections and amputation of his toes.

#### *Diabetes Mellitus*

Appendix 1, subsection 9.08 describes the symptoms that must exist in order for a person to be considered legally disabled for purposes of receiving Medicaid benefits. It states that in order to qualify for MA, a person with diabetes, must also have:

- A. Neuropathy demonstrated by significant and persistent disorganization of motor function in two extremities resulting in sustained disturbance of gross and dexterous movements, or gait and station. (see 11.00C); OR
- B. Acidosis occurring at least on the average of once every 2 months documented by appropriate blood chemical tests (pH or PCO<sub>2</sub> or bicarbonate levels); OR
- C. Retinitis proliferans evaluate the visual impairment under the criteria in 2.02, 2.03, or 2.04

#### *CFR, Appendix 1 to Subpart P of Part 404 (9.08)*

The medical records in Petitioner's DDB file do not indicate issues related to acidosis [excessive acid in body tissues caused by a lack of insulin] or retinitis proliferans [excessive growth of blood vessels in the retina that can cause swelling and detachment of the retina].

Petitioner's medical records do indicate that the Petitioner does suffer from peripheral neuropathy. The Case Development Worksheet from the DDB file indicates that Petitioner's symptoms were bi-lateral in both lower extremities; the DDB file further indicates that Petitioner's symptoms were, "corroborated by Doppler and objective findings of decreased sensation, decreased pulses, temperature changes of feet." (DDB file) However, it does not appear that the Petitioner's neuropathy meets the definition of "persistent disorganization of motor function", which *CFR, Appendix 1 to Subpart P of Part 404 (11.00C)* states must be, "in the form of paresis or paralysis, tremor or both involuntary movements, ataxia and sensory disturbances (any or all of which may be due to cerebral, cerebellar, brain stem spinal cord, or peripheral nerve dysfunction) which occur singly, or in various combinations..." with a certain "degree of interference with locomotion and/or interference with use of fingers, hands and arms."

According to Petitioner's medical records with the DDB file, Petitioner does not suffer from partial for full paralysis, tremors, involuntary movements or a significant loss of muscle coordination, although his gait is unstable due to the amputation of a toe from each foot.

Based upon the foregoing, it is found that the Petitioner does not meet the listing criteria and the analysis of his case must move on to tests 4 and 5.

### TEST 4

The fourth test asks whether Petitioner is capable of work she performed in the past. Per *40 CFR 404.1560 (b)(1)*, the question, more specifically, is did Petitioner engage in substantial gainful activity

(significant physical or mental activities for which she could have been paid) within the past 15 years, and if so, can Petitioner continue to perform that work?

According to the Case Development Worksheet, in an entry dated December 3, 2013, the Petitioner is not able to perform the work required in the job he held as a bowling alley mechanic for 24 years, which required heaving lifting and frequent walking. Thus, Petitioner passes the fourth test.

### TEST 5

This test asks whether Petitioner can perform any other work, despite his limitations. This is commonly referred to as a person's Residual Functional Capacity. Petitioner testified that he simply cannot stand for any length of time because of the pain and swelling in his feet. The Petitioner further testified that he might lose the remaining toes in his left foot, because the gangrene infection has reoccurred.

Petitioner is 53 years old and is therefore considered an individual closely approaching advanced age. 20 C.F.R. §404.1563(d) Petitioner testified that his education ended in the 9<sup>th</sup> grade.

The DDB file indicates that, pursuant to the criteria found in *Part 404, Subpart P, Appendix 2, part 202.11*, the DDB determined that Petitioner had a residual functional capacity to perform sedentary work, based upon his age, education and the ability to transfer his skills as a bowling machine mechanic to other work.

However, looking at Table No. 1 in *Part 404, Subpart P, Appendix 2*, it appears the factor that really determined whether Petitioner is legally disabled was whether he can transfer his skills as a bowling machine mechanic to other work.

It is unclear from the record, how exactly, Petitioner would transfer those skills to another job, particularly a sedentary one. Indeed, Petitioner worked as bowling machine mechanic for 24 years and knows no other work.

Based upon all of the foregoing, I find that Petitioner is not capable of engaging in sedentary work per Table No. 1 in *Part 404, Subpart P, Appendix 2, section 201.10*.

I also note the following:

20 CFR §404.1560(c)(1) states, "If we find that your residual functional capacity is not enough to enable you to do any of your past relevant work...we will look at your ability to adjust to other work...Any other work (jobs) that you can adjust to must exist in significant numbers in the national economy (either in the region where you live or in several regions in the country.)"

20 CFR §404.1560(c)(2) further states that, "In order to support a finding that you are not disabled at this fifth step of the sequential evaluation process, we are responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that you can do..."

The DDB provided no documentation or suggestion of what other work exists in significant numbers in the national economy that Petitioner can do given his age, education, work experience and limitations. A vague assertion that there is some job out there that Petitioner can do hardly satisfies the DDB's responsibility stated above.

Petitioner passes test 5.

## CONCLUSIONS OF LAW

Petitioner is incapable of performing even sedentary work for any meaningful period of time and is therefore disabled.

**THEREFORE, it is**

**ORDERED**

The county agency shall, within 10 days of receipt of said verification, certify Petitioner as eligible for Medicaid benefits, if he is otherwise qualified.

### **REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

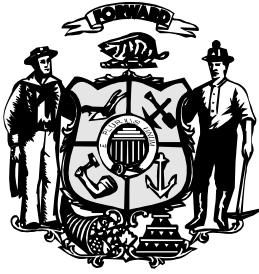
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 17th day of March, 2014.

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\sMayumi M. Ishii  
Administrative Law Judge  
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on March 17, 2014.

Racine County Department of Human Services  
Disability Determination Bureau